Labor Law Gap-Filling: Federal Common Law Ideals Versus Litigation Realities

TIMOTHY A. KELLEY*

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I. INTRODUCTION

While the Supreme Court famously denied the existence of a federal common law,[1] this sentiment does not reflect the reality of the modern federal Judiciary.[2] Even though federal common lawmaking remains in many

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* Articles Editor, *Ohio State Law Journal*; J.D. Candidate, The Ohio State Moritz College of Law, 2011; B.A., The College of William and Mary, 2008. This Note is dedicated to the memory of my father, Doug, whose example of diligence, faith, and humility continues to serve as an inspiration for all my endeavors. I am also indebted to my mother, Nancy, sisters, Erin and Charla, and brothers-in-law Ben and Larry; your love and support has always sustained and continues to sustain me in all that I do.

[1] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

[2] *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1640 (2008) (noting that despite the holding of *Erie Railroad v. Tompkins*, "it is well accepted that the federal courts retain common lawmaking powers in particular areas").

respects a "puzzle," [3] evidence shows that it is nonetheless expanding to encompass a variety of areas of substantive law.[4] One area of emergence over the past half-century has been the federal labor common law, created by the Supreme Court in order to carry out a perceived interest in uniform national labor law as established by acts of Congress.[5] While contemplating which substantive law to apply to lawsuits brought under the Labor Management Relations Act (LMRA), the Supreme Court's answer was "federal law, which the courts must fashion from the policy of our national labor laws."[6] The Court contemplated a common law regime where "[f]ederal interpretation of the federal law will govern, not state law."[7] Courts may be free to apply state rules if applicable and consistent with federal policy; however, state law "will be absorbed as federal law and will not be an independent source of private rights."[8]

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[3] *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585–86 (2006). Tidmarsh and Murray argue that federal courts must be both justified in order to explicitly create federal common law, and have a theoretical basis for exercising the discretion to apply the federal law. *Id.* at 587. This justification and basis for discretion arises when states' self-interest in a controversy prevents application of state law, and neither the Constitution nor Congress has created an applicable rule of decision. *Id.* at 588. Tidmarsh and Murray do not apply this analysis to areas where they say the Supreme Court has implied a federal common law from congressional action, such as federal labor law. *Id.* at 590–91.

[4] *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 761 (1989) ("[t]he Court continues to fashion discrete areas of purely judge-made substantive federal law . . . .").

[5] Federal preemption over state authority in the area of labor law originated with extensive New Deal legislation, notably the Wagner Act, commonly referred to as the National Labor Relations Act (NLRA), later amended by the Taft-Hartley Act (or Labor Management Relations Act (LMRA)). *See* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 47–49 (MIT Press 1993); STANLEY D. HENDERSON, LABOR LAW: CASES AND COMMENT 2 (2d ed. 2005). Supreme Court interpretation of this statutory framework eventually led to the creation of the federal common law used to adjudicate labor disputes. *See* Elizabeth Z. Ysrael, Note, *Federal Common Law of Labor Contracts: Recognizing a Federal Claim of Tortious Interference*, 86 COLUM. L. REV. 1051, 1053–54 (1986) (tracking the early development of federal labor law, and recognizing the Supreme Court's interpretation of § 301 of the LMRA as creating a federal labor common law); *see also* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593–94 (1992) (noting that the potential for federal preemption of state statutory and common law in the labor field is "particularly vast").

[6] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957); *see infra* notes 228–31 and accompanying text for further discussion of *Lincoln Mills*.

[7] *Lincoln Mills*, 353 U.S. at 457.

[8] *Id.*

This language from *Textile Workers v. Lincoln Mills* is most often connected with federal preemption of state law claims arising out of collective bargaining disputes.[9] However, the Court has promulgated federal labor common law through another vehicle: gap-filling statutes of limitations. In *DelCostello v. International Brotherhood of Teamsters*, the Court created a unique labor cause of action distinct from the statutory scheme: the "hybrid" claim, combining a plaintiff-employee's breach of collective bargaining claim against an employer under LMRA § 301 with a breach of duty of fair representation against a union.[10] Congress provides no express statute of limitations for such a judicially-fashioned claim; in similar circumstances, the federal court will normally identify the most analogous state cause of action and apply its statute of limitations to the federal claim.[11] However, the *DelCostello* Court chose to look past state law, and instead applied the statute of limitations of a federal labor law it felt best promoted the interests hybrid claims were perceived to balance.[12] While this may at first glance appear to be an inconsequential move, it was anything but: the statute of limitations the Court applied to the hybrid action tolls in a mere six months,[13] while state contract statutes that were traditionally applied to § 301 claims generally provide for limitations periods that can last up to ten years and beyond.[14]

This Note argues that by forging a six-month statute of limitations for hybrid § 301 actions in the name of federal labor law uniformity, the Supreme Court unintentionally created both a significant obstacle for plaintiff-employees seeking to assert their rights under collective bargaining in federal courts, and a powerful tool for defendant-employers seeking to

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[9] *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985); Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 104 (1962). In *Lucas Flour* and *Allis-Chalmers*, the Court held that any § 301 action for breach of a collective bargaining agreement must be decided under the federal common law, and that any state law claim purporting to allege a breach of a collective bargaining agreement must likewise be decided under federal law. *Allis-Chalmers Corp.*, 471 U.S. at 210 (citing *Lucas Flour Co.*, 369 U.S. at 103–04). For a more detailed discussion on the preemptive effect of § 301, see *infra* note 121.

[10] 462 U.S. 151, 164–65 (1983).

[11] *Id.* at 158–59 ("We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.").

[12] *Id.* at 168–71 ("[W]e have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.").

[13] *See id.*; 29 U.S.C. § 160(b) (2006).

[14] *See, e.g.*, OHIO REV. CODE ANN. § 2305.06 (West 2010) (providing a fifteen-year statute of limitations for breach of contract actions).

keep those employees from pulling them into costly litigation.[15] While "straightforward" § 301 claims may be subject to generous state contract limitations periods, a similar claim that is coupled with a union representation claim must be brought within a very tight time frame. Thus, an employee who is obligated to exhaust all remedies contained in a collective bargaining agreement is further punished by having to submit his or her claim against the employer and union within six months of the employee becoming aware of any breach of representation that the union may have committed.[16] Furthermore, some federal courts have expanded the rationale of *DelCostello* to a wide variety of claims based on federal policy arguments and broad preemption of state law, leading to inconsistency in labor law limitations periods. Interests in federal labor law uniformity and rapid resolution of union arbitration do not justify this disparity and confusion; absent an act of Congress to create an express limitations period for § 301 claims, the more equitable approach would give greater consideration to state laws and the generous time periods that they usually provide. By retracting from this federal labor common law approach, the Judiciary would return to the preferred practice of borrowing state statutes of limitations, give plaintiff-employees a break in federal court, and satisfy to a fuller extent the interests that the *DelCostello* Court sought to serve in the first place.

Part II of this Note provides a brief overview of the federal courts' practice of applying state statutes of limitations to causes of action for which Congress has failed to provide an express limitations period, as well as the exception to that practice as set forth in *DelCostello*. An analysis of the circuit courts' application of the *DelCostello* exception follows in Part III, focusing on the trends developed in the Sixth Circuit over the past twenty years. Part IV argues how a retreat from the expansion of the federal common law as seen in the *DelCostello* exception provides a better alternative for federal labor litigation, and Part V concludes.

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[15] *See* Joshua H. Grabar, *Labor Law*—Antol v. Esposto: *The Third Circuit Expands Preemption Under the Labor Management Relations Act*, 42 VILL. L. REV. 1995, 1997–98 (1997) (recognizing that § 301 actions are "advantageous for many employer defendants because they place mandatory satisfaction of certain procedural burdens on aggrieved plaintiffs," and are often "quashed during the first round of dispositive motions"); Christopher P. Yates, *Cutting the Gordian Knot: A Principled Response to Removal of State Law Claims to Federal Court Based on Section 301 Preemption*, 6 COOLEY L. REV. 483, 483–84 (1989) (recognizing the "distinct advantage" an employer has in § 301 claims due to procedural safeguards).

[16] *See* Ryan v. Gen. Motors Corp., 929 F.2d 1105, 1111 (6th Cir. 1989) (holding that a hybrid § 301 action accrues within six months from the date on which the plaintiff knew or should have known of the union's breach of its duty of fair representation).

II. CONGRESSIONAL SILENCE AND STATUTE OF LIMITATIONS BORROWING

A. *The Traditional Practice*

The issue at the core of *DelCostello* is a surprisingly common occurrence in federal law: congressional silence with respect to the statute of limitations to apply to a cause of action arising under federal legislation.[17] This problem has appeared with many notable pieces of federal legislation, including the Civil Rights Act of 1871, the Securities Exchange Act of 1934, and the Worker Adjustment and Retraining Notification Act of 1988.[18] The traditional answer the federal courts have applied to this problem has been to apply the statute of limitations of the most analogous state law to the federal cause of action.[19] Judges and commentators across a broad spectrum of judicial ideologies generally accept this norm;[20] however, the reason and justification behind this traditional practice depends upon whom you ask.

In his dissent in *DelCostello*, Justice Stevens offered one view: that the federal Judiciary is bound to borrow state statutes of limitations by congressional mandate.[21] This argument maintains that the Rules of Decision Act requires federal judges to apply state law whenever federal law is silent: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[22] Thus, borrowing state limitations periods is not merely a convenient practice, but a required one unless

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[17] *See* Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law To Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 393 (1997). In the early 1990s, Congress attempted to solve the statutory gap-filling process by enacting comprehensive fallback statutes of limitations for all federal causes of action. *See id.* at 394–95. However, the resulting legislation failed to address the problem in any meaningful way since it contains no retroactive provision. *See id.*; 28 U.S.C. § 1658 (2006). Thus, LMRA § 301 claims, as well as many other federal causes of action, have no express statute of limitations.

[18] Mikva & Pfander, *supra* note 17, at 393–94.

[19] *Id.* at 394.

[20] *See id.* at 408–09 (noting that "Justices across the spectrum of views on issues of federal common law and judicial gap-filling" generally accept the mandate to gap-fill federal legislation with non-congressional material, usually analogous state law limitations periods).

[21] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 172–74 (1983) (Stevens, J., dissenting) ("For the past century federal judges have 'borrowed' state statutes of limitations, not because they thought it was a sensible form of 'interstitial law making,' but rather because they were directed to do so by the Congress of the United States.").

[22] 28 U.S.C. § 1652 (2006).

Congress expressly provides a time period within the cause of action that it creates.[23]

Justice Scalia offered an alternative rationale in his concurrence in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*[24] Justice Scalia's argument outlines a two-phase history of state law borrowing. In the first phase, federal courts used state statutes of limitations not by borrowing them; rather, the federal courts believed that the state statutes applied on their own force unless specifically preempted by federal authority.[25] In the second phase, the federal courts shifted their focus from the inherent power of the state statute to the intention of Congress in drafting the federal statute.[26] The courts thus viewed congressional silence not as a failure to preempt state law, but as an "affirmative directive to borrow state law."[27] According to Justice Scalia, this shift of focus from presumed state authority to congressional intent was erroneous;[28] in his view, federal court statute "borrowing" should reflect deference to the states, and not resemble an activist court "prowling hungrily" through legislation in order to "pounc[e]" on the limitations period it thinks best effectuates the federal cause of action.[29]

Former D.C. Circuit Judge Abner Mikva and Professor James Pfander offer a theory on the justification of state law borrowing that is much less binding than Justice Stevens's, and much more pragmatic than Justice Scalia's. Mikva and Pfander suggest that early Supreme Courts gap-filled

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[23] *See DelCostello*, 462 U.S. at 174 (Stevens, J., dissenting) ("Congress has given us no reason to depart from our settled practice, grounded in the Rules of Decision Act, of borrowing analogous state statutes of limitation in cases such as this."). The *DelCostello* majority, while disagreeing with Justice Stevens's reasoning, nonetheless agreed that the normal outcome in these cases would be the application of state limitations periods. *See id.* at 171 (majority opinion) ("[A]s the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods."). For a discussion on how the Rules of Decision Act prohibits federal common law-making, see generally Redish, *supra* note 4.

[24] 483 U.S. 143, 157 (1987) (Scalia, J., concurring). In *Agency Holding Corp.*, the Court—utilizing and extending the *DelCostello* rationale—applied the Clayton Act's four-year statute of limitations to civil RICO claims. *Id.* at 156 (majority opinion).

[25] *Id.* at 158 (Scalia, J., concurring).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 158–59.

[29] *Id.* at 166. In Justice Scalia's view, the borrowing path the majority took in *DelCostello* and *Agency Holding Corp.* was a "giant leap into the realm of legislative judgments." *Id.* at 157.

federal statutes with state limitations out of "sheer necessity."[30] For example, the Court in *Campbell v. Haverhill* reasoned that the absence of a statute of limitations in congressional patent infringement law was "utterly repugnant to the genius of our laws;"[31] thus, it simply applied a state limitations period of identical length to a patent law Congress had recently enacted.[32] According to Mikva and Pfander, the *Campbell* Court rejected the theory that the state law applied through its own authority and instead justified its decision by stating that Congress, through the Rules of Decision Act, directed federal courts to gap-fill federal statutes using state law.[33] Mikva and Pfander contend that the *Campbell* Court did not view this gap-filling as mandatory; rather, it believed courts could look outside the realm of state law if the statute of limitations was impractical for enforcement of the federal law.[34] Thus, the key to statute of limitations selection was flexibility, not a congressional mandate or the presumed authority of state law in the absence of federal preemption.[35]

Regardless of the justification, it has indisputably been the traditional practice of federal courts to look to analogous state statutes of limitations whenever Congress is silent with respect to the limitations period of a federal cause of action.[36] Section 301 claims under the LMRA[37] against employers for breach of collective bargaining agreements are no exception. Section 301

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[30] *See* Mikva & Pfander, *supra* note 17, at 409–11. Mikva and Pfander argue that despite its reaffirmation in recent Supreme Court cases, "the rule of primary reliance on state law rests on relatively weak foundations." *Id.* at 409.

[31] 155 U.S. 610, 616–17 (1895).

[32] Mikva & Pfander, *supra* note 17, at 409–10.

[33] *Id.* at 410.

[34] *Id.* at 410–11.

[35] *See id.* at 411. According to Mikva and Pfander, "state limitations periods apply to federal claims, not of their own force and not by virtue of the Rules of Decision Act, but only by virtue of their 'implied absorption . . . within the interstices of the federal enactments' through the process of fashioning federal common law." *Id.* (quoting Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946)). Thus, "the Court remains free to borrow a federal limitations period in appropriate cases," even though it has "largely failed to justify its continuing adherence to a rule of primary reliance on state law." *Id.*

[36] *See id.* at 394 ("Under the standard learning, federal courts supply omitted time limits by borrowing the most analogous statute of limitations from state law."); *see also* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158–59 (1983).

[37] Pub. L. No. 80-101, 61 Stat. 136 (1947). Also known as the Taft-Hartley Act, the LMRA's declared purpose was "[t]o amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes." *Id.* In reality, the effect of the LMRA "was to impose responsibilities and regulations upon unions as well as employers, since the 1935 Wagner Act had fashioned restrictions only for employers." GOULD, *supra* note 5, at 48–49.

of the LMRA creates a cause of action for "violation[s] of contracts between an employer and a labor organization representing employees."[38] While the language of the cause of action suggests that § 301 plaintiffs must be parties to the collective bargaining agreement (either the employer or the union), the Supreme Court has rejected this reading,[39] thereby permitting an individual employee to bring a § 301 suit as a third-party beneficiary to the collective bargaining agreement.[40]

Courts have consistently found that, standing alone, a § 301 claim brought by either a union or an individual employee is most analogous to state actions for breach of contract because it essentially depends on interpretation of the terms of the collective bargaining agreement in question.[41] However, § 301 claims against employers are often joined with

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[38] Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (2006).

[39] *See* Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962) ("The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery .... To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.").

[40] *See* Anderson v. AT&T Corp., 147 F.3d 467, 473 (6th Cir. 1998) ("[W]e have long recognized that the plaintiff can recover for the employer's breach of a collective bargaining agreement if the plaintiff is a third-party beneficiary of the agreement.").

[41] *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 708 (1966) (applying Indiana's six-year statute of limitations for unwritten contracts to a § 301 claim); *see, e.g.*, *Anderson*, 147 F.3d. at 474 (applying Ohio's statute of limitations for breach of contract to plaintiff's § 301 claim); Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1216 (6th Cir. 1987) (applying Ohio's statute of limitations for breach of contract to plaintiff's § 301 claim); Cent. States Se. and Sw. Areas Pension Fund v. Kraftco, 799 F.2d 1098, 1107–08 (6th Cir. 1986) (applying Tennessee's statute of limitations for breach of contract to plaintiff's § 301 claim); Int'l Ass'n of Machinists v. Allied Prod. Corp., 786 F.2d 1561, 1563 (11th Cir. 1986) (noting that when a § 301 claim resembles a breach of contract suit, the applicable state contract statute of limitations will be applied); Smith v. Kerrville Bus Co., 748 F.2d 1049, 1054–55 (5th Cir. 1984) (finding the plaintiff's § 301 suit analogous to breach of contract, and insulated from the *DelCostello* hybrid exception); O'Hare v. Gen. Marine Transp. Corp., 740 F.2d 160, 167–68 (2d Cir.

breach of the duty of fair representation[42] claims against the union representing the employee in the collective bargaining agreement that is the subject of the § 301 lawsuit.[43] In many cases, the collective bargaining agreement will require that an employee exhaust all remedies—typically

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1984) (holding that a "traditional section 301 breach of contract action" was governed by New York statute of limitations).

[42] The basis for a union's duty of fair representation is two-fold. First, Supreme Court decisions interpreting early labor legislation found an implicit obligation upon the union to represent its employees in good faith. *See e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (observing that a union's duty of representation is "subject always to complete good faith and honesty of purpose in the exercise of its discretion"); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944) (holding that the Railway Labor Act "imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."). Second, the National Labor Relations Board has interpreted the exclusivity provision of NLRA § 9(a) to impose a duty of fair representation upon majority-representative unions, the breach of which constitutes an unfair labor practice under NLRA §§ 8(b)(1)(A) and 8(b)(2). *See* Miranda Fuel Co., 140 N.L.R.B. 181, 185–86 (1962) (finding a § 8(b)(1)(A) violation when a union "tak[es] action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair," and finding a § 8(b)(2) violation when, "for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee").

[43] *See Anderson*, 147 F.3d at 473 ("[t]he most common kind of Section 301 case is the so-called 'hybrid' case, in which employees sue both their union, for breach of the duty of fair representation, and their employer, for breach of a collective bargaining agreement."). The Supreme Court first recognized the factual scenario under which an individual employee's § 301 breach of contract claim against his employer would intersect with a breach of duty of representation claim against his union in *Vaca v. Sipes*:

> We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the plaintiff-employee has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the plaintiff-employee's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.

386 U.S. 171, 185–86 (1967). The critical effect of *Vaca* was to insulate these types of claims from *Garmon* preemption—i.e., from being removed from the courts' jurisdiction to NLRB adjudication. *Id.* at 187. For further discussion on the role of *Garmon* preemption, see ALVIN L. GOLDMAN, THE SUPREME COURT AND LABOR-MANAGEMENT RELATIONS LAW 62–69 (1976); *see also infra* note 121.

consisting of arbitration—contained within the agreement itself before filing a lawsuit against the employer.[44] Thus, after exhaustion of the collective bargaining procedure, an employee with an unresolved claim against his employer will have a new claim against the union that failed to adequately represent his or her interests.[45] The *DelCostello* Court was tasked to characterize this type of lawsuit and determine the applicable statute of limitations.

B. DelCostello *and the Hybrid Exception*

In *DelCostello v. International Brotherhood of Teamsters*,[46] the Court considered what statute of limitations to apply when an employee brought an action against both his employer and his union.[47] Philip DelCostello, a driver employed by Anchor Motor Freight, Inc., and represented by Teamsters Local 557, refused to operate a tractor trailer that he felt was unsafe.[48] DelCostello claimed that Anchor fired him over this dispute, and he subsequently filed a complaint with the union, which in turn filed a formal grievance pursuant to the collective bargaining agreement.[49] The regional joint union-management committee determined DelCostello's claim was without merit, a decision binding on all parties under the collective bargaining agreement.[50] DelCostello filed suit against both Anchor and the Teamsters in the federal District Court of Maryland, claiming that his employer had discharged him in violation of the collective bargaining agreement, and that the union had represented him in a "discriminatory, arbitrary, and perfunctory manner" during the grievance procedure.[51]

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[44] *See* Grabar, *supra* note 15, at 1997; *see also* Yates, *supra* note 15, at 483.

[45] *See Vaca*, 386 U.S. at 186 (holding that when collective bargaining agreement requires exhaustion of arbitration remedies, "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as a bargaining agent breached its duty of fair representation in its handling of the employee's grievance"); *see also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976) (extending *Vaca* to hold that the finality provision of a collective bargaining agreement cannot be enforced in favor of the employer unless the union has satisfied its duty of fair representation).

[46] 462 U.S. 151 (1983).

[47] *Id.* at 154.

[48] *Id.* at 155. Before the Supreme Court, DelCostello's claim was joined with similar claims brought by Donald Flowers and King Jones, welders employed by Bethlehem Steel Corp. and represented by Steelworkers Local 2602. *Id.* at 156.

[49] *Id.* at 155.

[50] *Id.*

[51] *DelCostello*, 462 U.S. at 155–56.

Initially, the district court held that DelCostello's claim was subject to Maryland's three-year statute of limitations for actions on contracts; however, on reconsideration following the Supreme Court's decision in *United Parcel Service, Inc., v. Mitchell*,[52] the court held that Maryland's thirty-day statute of limitations for actions to vacate arbitration awards applied, thus barring the lawsuit.[53] After the Fourth Circuit affirmed, the Supreme Court granted certiorari in order to address two questions left unanswered in *Mitchell*: first, what statute of limitations should be applied to the claim against the union; and second, whether a federal statute of limitations should be borrowed for the action.[54] Specifically, the Court addressed DelCostello's argument that his claim against both his employer and the union should be governed by the six-month statute of limitations of § 10(b) of the National Labor Relations Act (NLRA).[55] In arriving at its conclusion that the NLRA limit did apply, the Court cleared two analytical hurdles: first, it justified its departure from the normal practice of borrowing state statutes of limitations; second, it justified its choice of the federal limitation period over several state statutes.[56]

The Court, speaking through Justice Brennan, conceded that when federal statutes are silent with respect to the statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law."[57] However, the Court asserted that under special circumstances, borrowing a state statute of limitations could be an "unsatisfactory vehicle for the enforcement of federal law."[58] In these

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[52] 451 U.S. 56, 64 (1981) (holding that a lawsuit against an employer for breach of a collective bargaining agreement arising out of a grievance proceeding should be governed by a state statute of limitations for vacation of an arbitration award, rather than a state statute of limitations for actions on contract).

[53] *DelCostello*, 462 U.S. at 156.

[54] *Id.* at 154. The *Mitchell* Court did not address these questions because only the employer, and not the union, had filed a petition for certiorari; therefore, the only question presented was which state statute of limitations should apply to the claim against the employer. *Id.* at 154 nn.1–2; *Mitchell*, 451 U.S. at 60.

[55] *DelCostello*, 462 U.S. at 158. Section 10(b) of the NLRA provides: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b) (2006).

[56] *See DelCostello*, 462 U.S. at 158–63, 169–70.

[57] *Id.* at 158.

[58] *Id.* at 161. The Court referenced three cases in which it considered a state limitations period inappropriate for a federal cause of action: *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (declining to apply state limitations periods to Title VII enforcement suits); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (applying a federal statute of limitations over a state personal injury time period to a seaworthiness action under general admiralty law); and *Holmberg v. Armbrecht*, 327 U.S.

situations, applying the state time limit would be "at odds with the purpose or operation of federal substantive law," and may "frustrate or interfere with the implementation of national policies."[59] Thus, if application of a state limitation period did not promote "those consensual processes that federal labor law is chiefly designed to promote," the Court was prepared to break from the general practice of borrowing state rules and find a more analogous statute of limitations in federal law.[60]

In a lengthy footnote, the Court dismissed the respondent's and Justice Stevens's argument that the Rules of Decision Act[61] and the *Erie* doctrine compelled the use of a state statute of limitations.[62] The Court regarded the Rules of Decision Act as inapplicable because it was itself silent with respect to federal causes of action; thus the question of which statute of limitations to apply to a federal cause of action was a federal question.[63] Accordingly, because "interstitial federal lawmaking is a basic responsibility of the federal courts," the Court determined it was competent to gap-fill the statute of limitations it felt best satisfied the purpose of the federal cause of action.[64] The Court found confirmation of this principle in the *Erie* doctrine, since that case recognized that "the purpose of the [Rules of Decision Act] was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity cases would apply as their rules of decision the law of the State, unwritten as well as written."[65] Thus, the practice of applying state limitation periods to federal causes of action was not mandated by the Rules of Decision Act nor the *Erie*

392, 396 (1946) (holding that state statutes of limitations would not apply to a federal cause of action lying solely in equity).

[59] *DelCostello*, 462 U.S. at 161. (quoting *Occidental Life Ins. Co.*, 432 U.S. at 367). For example, the Court noted that in *Occidental* the state statute was passed by because it "might unduly hinder the policy of [Title VII] by placing too great an administrative burden on the agency." *Id.* at 162.

[60] *See id.* at 163 (quoting UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)).

[61] "The laws of the several states, except where the Constitution or the treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2006).

[62] *See DelCostello*, 462 U.S. at 172–74 (Stevens, J., dissenting) ("Congress has given us no reason to depart from our settled practice, grounded in the Rules of Decision Act, of borrowing analogous state statutes of limitation in cases such as this."); *see also supra* notes 21–23 and accompanying text.

[63] *DelCostello*, 462 U.S. at 159 n.13 (citing UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1996)).

[64] *Id.* at 159–60 & n.13 (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)).

[65] *Id.* at 160 n.13 (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72–73 (1938)).

doctrine, but instead was a way to "fashion[] . . . remedial details under the respective substantive federal statutes."[66]

Unbound by analogous state statutes of limitations, the Court proceeded to evaluate a number of time periods under state and federal law in order to determine which best applied to DelCostello's cause of action. First, the Court distinguished DelCostello's claim from a "straightforward breach-of-contract suit" under the Labor Management Relations Act, since he had also brought a claim against the union for breach of the duty of fair representation.[67] Citing *Vaca* and *Hines*, the Court regarded the two claims as formally distinct yet "inextricably interdependent," and characterized them as consisting of a single "hybrid" claim challenging the entire grievance process mandated by the collective bargaining agreement.[68] In light of the "practical application in view of the policies of federal labor law and the practicalities of hybrid § 301-fair representation litigation," the Court construed the claim before it as substantively unique, with "no close analogy in ordinary state law."[69]

Second, the Court addressed several potential analogous state causes of action. The Court reaffirmed its prior determination in *Mitchell* that an action to vacate an arbitration award was more analogous than an action for breach of contract; however, this option was "imperfect" because of dissimilarities between a labor grievance process and commercial arbitration.[70] Moreover, the Court determined that state arbitration limits were relatively short (ninety days), and "fail[ed] to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights" under federal labor doctrine.[71] The Court next considered Justice Stevens's suggestion that a state legal malpractice statute of limitations be applied, the analogy being a cause of action against a

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[66] *Id.* (citing Holmberg v. Armbrecht, 327 U.S. 392, 394–95 (1946)).

[67] *Id.* at 164–65.

[68] *Id.* The Court noted that *Vaca* and *Hines* provided that "when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation . . . an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* at 164 (citing Bowen v. U.S. Postal Serv., 459 U.S. 212 (1983); United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Czosek v. O'Mara, 397 U.S. 25 (1970); Vaca v. Sipes, 386 U.S. 171 (1967)).

[69] *DelCostello*, 462 U.S. at 165.

[70] *Id.* at 165–66. The Court noted that in commercial arbitration, the party will normally be represented by counsel or have some experience in negations, while in labor disputes, the employee is often "unsophisticated" with respect to the collective bargaining process and will be completely reliant on the union. *Id.*

[71] *Id.* at 166.

lawyer (here, the union) who mishandles commercial arbitration.[72] While this option was considered a closer analogy, the Court rejected it as well because the period would be *too long* (three years and beyond), and would therefore jeopardize the interest in rapid resolutions of labor disputes favored by federal law.[73]

While prepared to tolerate these "objections" in another context, the Court found a convenient answer in federal labor legislation: specifically, the six-month period for unfair labor practice charges under § 10(b) of the NLRA.[74] The basis for the analogy here was that the National Labor Relations Board had consistently held all breaches of a union's duty of fair representation as unfair labor practices.[75] Moreover, the Court reasoned that Congress balanced the same personal rights and national considerations in formulating § 10(b) that were at issue in DelCostello's suit: finality in employee settlements and stability in collective bargaining.[76] With these interests in mind, the Court found a "need for uniformity" in the adjudication of hybrid claims, a need addressed with "clear congressional indication" through § 10(b) of the NLRA.[77]

Although the *DelCostello* Court was quick to limit the breadth of its departure from the practice of borrowing state statutes of limitations,[78] it had

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[72] *Id.* at 167.

[73] *Id.* at 168. In support of this point, the Court quoted *Mitchell* with approval: "This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later." *Id.* at 169 (quoting *Mitchell*, 451 U.S. at 63–64).

[74] *Id.* at 169 ("These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.")

[75] *DelCostello*, 462 U.S. at 170; *see also supra* note 42.

[76] *DelCostello*, 462 U.S. at 170–71 (quoting *Mitchell*, 451 U.S. at 70–71 (Stewart, J., concurring in the judgment)).

[77] *Id.* at 171. This rationale follows a trend in labor law which subordinates the interests of individual employees in favor of systemic interests in collective bargaining. *See supra* Part IV.A.

[78] *DelCostello*, 462 U.S. at 171 ("We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy."). The Court has also specifically limited the reach of *DelCostello* in subsequent cases. In *Reed v. United Transportation Union*, the Court held that an employee's

an immediate impact by judicially creating a new statute of limitations for a judicially formed cause of action: the hybrid § 301-breach of fair representation claim.[79] While the Court could be criticized for "prowling hungrily" through federal law to find a statute of limitations it felt was fair for the hybrid claim,[80] it nonetheless succeeded in creating a new limitations period that became so entrenched in federal labor law that it was initially reserved for exclusion in Congress's attempt to provide uniform statutes of limitations for silent causes of action during the early 1990s.[81] However, the true practicality of the new limitations period would be tested outside of Washington, in labor litigation throughout the federal courts.

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freedom of speech claim against his union under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA) was governed by a three-year state limitations period for personal injury actions, and not § 10(b) of the NLRA. 488 U.S. 319, 323 (1989). While the LMRDA claim implicated the interests espoused in *DelCostello*—finality in employee settlements and stability in collective bargaining—on a mere "tangential and remote" basis, *id.* at 330, it was directly modeled on the First Amendment's guarantee of free speech. *Id.* at 334. Therefore, the most closely analogous federal statute to the LMRDA claim was 42 U.S.C. § 1983—providing protection of individual rights against state action—which, as the Court noted, was governed by state general or residual personal injury statute of limitations. *Id.* (citing Owens v. Okure, 488 U.S. 235 (1989)). In *North Star Steel Co. v. Thomas*, the Court held that an action brought by a union and union members under the Worker Adjustment and Retraining Notification Act (WARN) was governed by state limitations periods ranging from two to six years. 515 U.S. 29, 35–36 (1995). The Court distinguished *DelCostello* by noting that in that case the available state limitations periods "'typically provide[d] very short times' and thus 'fail[ed] to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights.'" *Id.* at 36 (quoting *DelCostello*, 462 U.S. at 166 & n.15). In contrast, the state periods analogous to WARN were "not short enough to frustrate an employee seeking relief." *Id.*

[79] *See* Mikva & Pfander, *supra* note 17, at 402 (describing § 301 hybrid claims as "the judge-made claims that disappointed grievants bring to challenge the results of the union-management arbitration systems in place under many collective bargaining agreements").

[80] *See* Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 166–70 (Scalia, J., dissenting) (criticizing the majority's use of the Clayton Act to gap-fill the statute of limitations for RICO civil enforcement actions).

[81] *See* Mikva & Pfander, *supra* note 17, at 402 (noting that during the congressional attempt to set uniform statutes of limitation for federal causes of action under 28 U.S.C. § 1658, a "House Report included the six-month period established in *DelCostello* on its list of the limitations periods that its prospective approach to § 1658 would not affect").

III. APPLICATION OF *DELCOSTELLO* IN LABOR LITIGATION IN THE FEDERAL COURTS

As discussed above, *DelCostello* created a new hybrid cause of action with a set six-month statute of limitations.[82] Presumably, any litigant bringing a cause of action against his or her employer for breach of a collective bargaining agreement along with a cause of action against his or her union for breach of its duty of fair representation would be required to bring the action within the six-month time period. While the *DelCostello* Court may have intended this limitations period to be a fair balancing of national labor interests,[83] it has had at least two unforeseen consequences in litigation. First, a sharp disparity exists between straightforward § 301 claims—generally subject to a lengthy state contract law statute of limitations—and hybrid actions barred six months after accrual. Simply because an employee is subject to a union arbitration or grievance proceeding (that fails to resolve the employee's complaint), the *DelCostello* doctrine severely cuts the amount of time he or she has to file a lawsuit in federal court. Second, under the doctrine of § 301 preemption,[84] employee causes of action arising under *state* law have been precluded by the federal statute of limitations, when the state limitations period would have allowed the action to proceed. As a result of these practical consequences, the statute of limitations fashioned by the Court as a labor interest balancing compromise has instead become a tool for employer-litigants seeking to dismiss a variety of claims invoked against them.

A. *Trends in the Sixth Circuit*

An examination of several Sixth Circuit cases in particular reveals the evolution of the hybrid claims in federal labor litigation, and how this phenomenon has affected actual employee, employer, and union litigants.[85]

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[82] *See id.* (referring to hybrid claims as "judge-made" actions).

[83] *See DelCostello*, 462 U.S. at 171 (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 70–71 (1981), for the proposition that the NLRA statute of limitations reflects the "proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system").

[84] *See infra* note 121.

[85] The Sixth Circuit—encompassing the Rust Belt states of Ohio, Michigan, and Indiana—has produced a large volume of § 301 hybrid cases over the past twenty years, making it a prime candidate for the purpose of identifying trends in the application of *DelCostello*. Shepardizing the *DelCostello* opinion on LexisNexis reveals that federal courts in the Sixth Circuit have cited *DelCostello* 643 times, more than any other federal circuit. *See generally* STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT: AN INSIDE

As shown below, over the past twenty years the Sixth Circuit has both limited and expanded the claims reached by *DelCostello*'s analysis, thus creating inconsistency in the treatment of limitations periods in labor litigation.

1. *Limiting the Reach of* DelCostello *in the Sixth Circuit*

One of the earliest Sixth Circuit cases following the *DelCostello* decision clearly established that the six-month statute of limitations should be limited to the facts establishing a hybrid § 301 cause of action as outlined by the Supreme Court. *Central States Southeast and Southwest Area Pension Fund v. Kraftco Inc.* was a complex lawsuit initially brought by a pension fund against an employer, Kraftco, alleging failure to make payments to the fund as required by a collective bargaining agreement with Teamsters Local Union 327.[86] Kraftco then filed its own lawsuit alleging that the union violated the terms of agreements formed through letters outside of the collective bargaining agreement, and the two cases were consolidated.[87] The pension fund's action consisted of three distinct claims: (1) breach of trust under federal ERISA law; (2) breach of collective bargaining agreement under § 301 of the LMRA; and (3) breach of trust agreement under state law.[88] The circuit court was thus tasked to determine the applicable statute of limitations for each cause of action.[89]

With respect to the ERISA claim, Kraftco argued that *DelCostello* compelled application of the six-month NLRA statute of limitations, because the claim was "an attack on the negotiating process akin to an action for breach of the duty of fair representation."[90] The court rejected this argument and applied the six-year statute of limitations for breach of contract under Tennessee law.[91] The court recognized that *DelCostello* was not a "green light" to apply the six-month statute of limitations to "all actions in which federal labor law is implicated."[92] Because the pension fund's ERISA claim "relate[d] solely to the employer's failure to comply with the terms of the

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STUDY OF THE AMERICAN LABOR MOVEMENT (2004) (discussing and challenging trends of the labor movement in the Rust Belt region).

[86] 799 F.2d 1098, 1100 (6th Cir. 1986).

[87] *Id.*

[88] *Id.* at 1104.

[89] *Id.*

[90] *Id.* at 1105.

[91] *Id.* at 1106–07.

[92] *Kraftco*, 799 F.2d at 1107 (citations omitted).

collective bargaining agreement," the court found state contract law as the most analogous statute of limitations.[93]

Likewise, the court applied the Tennessee six-year statute of limitations to the pension fund's § 301 breach of contract claim.[94] The court recognized that it had previously applied state contract limitation periods to § 301 actions, and noted that the practice was followed by other circuits as well.[95] Essentially, the Sixth Circuit stated that a § 301 breach of collective bargaining agreement action, standing on its own, would continue to be governed by the applicable state contract statute of limitations,[96] which in general will be much longer than the six months allowed under the NLRA.[97]

Another piece of complex litigation in the Sixth Circuit confirmed this principle over a decade later. In *Anderson v. AT&T Corp.*, the plaintiff-employees lost certain benefits obtained in collective bargaining when they were transferred from plants in North Carolina, Arizona, and Missouri to Columbus, Ohio.[98] After unsuccessful attempts to receive assistance from two different unions—Communications Workers of America (CWA) and International Brotherhood of Electrical Workers (IBEW)—the employees brought a § 301 action against AT&T.[99] CWA was subsequently joined as an involuntary plaintiff, and IBEW was joined as an involuntary defendant.[100]

AT&T argued that the employees' § 301 claim was barred by the six-month statute of limitations under *DelCostello*.[101] The court rejected this argument, noting that the *DelCostello* Court "took great pains to make clear that there is no generally applicable limitations period for Section 301 claims; instead, the appropriate limitations period depends on the particular claims raised in the case."[102] As opposed to setting a firm time limit for § 301 actions, the court summarized the *DelCostello* Court's reasoning as

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[93] *Id.* at 1106.

[94] *Id.* at 1107–08.

[95] *Id.* at 1108 (citing Int'l Assoc. of Machinists v. Allied Prod. Corp., 786 F.2d 1561, 1563 (11th Cir. 1986); O'Hare v. Gen. Marine Trans. Corp., 740 F.2d 160, 167–68 (2d Cir. 1984); Smith v. Kerrville Bus Co., 748 F.2d 1049, 1051 (5th Cir. 1984)).

[96] *Id.*

[97] *See, e.g.*, KY. REV. STAT. ANN. § 413.090(2) (Lexis Nexis 2005) (fifteen years); MICH. COMP. LAWS § 600.5807(8) (2000) (six years); OHIO REV. CODE ANN. § 2305.06 (West 2004) (fifteen years); TENN. CODE ANN. § 28-3-109 (2000) (six years).

[98] 147 F.3d 467, 471 (6th Cir. 1998).

[99] *Id.* As the employees' previous union, CWA could not assist them because it was no longer their bargaining representative; as the employees' current union, IBEW could not bring a grievance to enforce a right created under an agreement to which it was not a party. *Id.*

[100] *Id.*

[101] *Id.* at 474.

[102] *Id.*

"[c]oncluding that the 90-day state-law limitations provision was too short given the facts of the case . . . [and] it was appropriate to apply the longer limitations period."[103] Thus, the court decided that the most analogous statute of limitations to apply to the employees' § 301 claim was Ohio's fifteen-year limit on actions for breach of written contracts.[104]

Anderson strikes an interesting contrast with *DelCostello* because even though multiple unions were parties to the litigation, and those unions' behavior in representing their employees' interests was a crucial factor in the case, the court nonetheless held that the § 301 claim against AT&T was most analogous to breach of contract.[105] This treatment by the circuit court undermines the notion that the addition of union grievance/arbitration issues alone alters a § 301 claim so dramatically as to shift the analogous claim from breach of contract under state law, to an unfair labor practice under the NLRA. The union in *DelCostello* refused to process the employee's grievance, and the unions in *Anderson* were incapable to do so under contractual obligation; yet, the circuit court considered Ohio's contract period to be the most applicable to the claim. Thus, unlike the plaintiffs in *DelCostello*, the plaintiff-employees here were able to avail themselves of the generous statutory period the state legislature had intended.

In a slightly different context, the Sixth Circuit found that an employee's claim that he was wrongfully expelled from his union was governed by a one-year state statute of limitations, and not the six-month period provided by the NLRA.[106] In *Holmes v. Donovan*, a plaintiff-employee brought an action under § 101(a)(5) of the Labor-Management Reporting and Disclosure Act (LMRDA),[107] alleging that he was expelled from his union without notice or a hearing, as required by federal law.[108] Similar to § 301 of the LMRA, the employee's LMRDA claim provided no limitations period.[109]

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[103] *Id.*

[104] *Anderson*, 147 F.3d at 474; OHIO REV. CODE ANN. § 2305.06 (West 2004).

[105] *Anderson*, 147 F.3d at 474.

[106] Holmes v. Donovan, 984 F.2d 732, 738 (6th Cir. 1993). While the Sixth Circuit limited the reach of *DelCostello* with respect to the plaintiff-employee discussed here, it *expanded* its reach with respect to a different plaintiff-employee's LMRA § 302 claims. *See infra* notes 159–68 and accompanying text.

[107] Section 101(a)(5) of the LMRDA provides that "[n]o member of any labor organization may be fined, suspended, expelled, or otherwise disciplined . . . by such [labor] organization . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 29 U.S.C. § 411(a)(5) (2006).

[108] *Holmes*, 984 F.2d at 734.

[109] *Id.*

The district court, relying on *DelCostello*, applied the NLRA six-month period to the claim and dismissed it as time-barred.[110]

The Sixth Circuit reversed, finding that Tennessee's statute of limitations for personal injury actions was more closely analogous to the LMRDA claim than § 10(b) of the NLRA.[111] The court arrived at this conclusion through two steps. First, relying on *Reed v. United Transportation Union*,[112] the court reasoned that § 101(a)(5) was designed to address the denial of union members' individual rights.[113] Because the LMRDA protected "fundamental notions of due process," the most analogous *federal* cause of action was found in 42 U.S.C. § 1983, protecting against the denial of individual rights under color of state law.[114] Second, the court noted that § 1983 claims were "governed by state general or residual statutes of limitations for personal injury actions."[115] Thus, since § 101(a)(5) of the LMRDA protected similar interests as § 1983, the court applied the relevant statute of limitations for state personal injury actions: one year under Tennessee law.[116]

Anderson and *Holmes* provide illustrative examples where strong union interests in grievance resolution and labor litigation were insufficient for the Sixth Circuit to find them governed under the NLRA statute of limitations by virtue of the federal labor common law. What justifies the return to standard state limitations borrowing in cases like this, when the policy interests are so similar to those which the *DelCostello* Court used to justify a break away from the traditional practice and look to federal law? Stated differently, how does a case such as *Anderson*—where two unions are incapable of assisting their constituent employees—differ so markedly from a case where the union simply fails to assist, that statutes of limitations differing by several orders of magnitude are justified? As will be shown below, a series of cases emerged in the Sixth Circuit which expanded the reach of the hybrid statute of limitations, as well as suggested a mechanical application of the six-month statute of limitations in any § 301 claim. These cases do not resolve the question stated above, but they do have a dramatic practical impact on the plaintiff-employees who litigate them.

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[110] *Id.* at 737.

[111] *Id.* at 738.

[112] The Supreme Court's limitation of *DelCostello* in *Reed* is discussed *supra* note 78.

[113] *Holmes*, 984 F.2d at 738.

[114] *Id.*; TENN. CODE ANN. § 28-3-104(a)(1) (2000).

[115] *Holmes*, 984 F.2d at 737 (citing Reed v. United Transp. Union, 488 U.S. 319, 326 (1989); Owens v. Okure, 488 U.S. 235 (1989); Wilson v. Garcia, 471 U.S. 261 (1985))

[116] *Id.* at 738.

2. *Expanding the Reach of* DelCostello *in the Sixth Circuit*

In *Fox v. Parker Hannifin Corp.*, the Sixth Circuit engaged in a dramatic expansion of the *DelCostello* exception through the preemption of state-law claims.[117] Fox, the plaintiff-employee, had filed a series of informal complaints with both her employer and union over the course of several years, leading to her eventual discharge.[118] One year after her employer refused to reinstate her and her union refused to take any further action on her behalf, Fox filed suit, claiming discharge in breach of the collective bargaining agreement, breach of her union's duty of representation, and a host of state law claims, including breach of contract, promissory estoppel, negligence, and fraud.[119]

Pursuant to *DelCostello*, the circuit court combined the breach of collective bargaining agreement and breach of duty of representation claims into a hybrid § 301 action, and accordingly applied the six-month NLRA statute of limitations.[120] However, the court did not stop there. Following the Supreme Court's recognition that § 301 is expansive in its coverage of individual collective bargaining workers' claims, the circuit court concluded that § 301 preempted several of Fox's state law claims.[121] Accordingly, these

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[117] 914 F.2d 795 (6th Cir. 1990).

[118] *Id.* at 798.

[119] *Id.* at 798–99.

[120] *Id.* at 803.

[121] *Id.* at 799–803. The preemptive effect of § 301 is premised on the idea that the LMRA "authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." Textile Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957). Thus, any state law claim brought by an employee that is "inextricably intertwined with consideration of the terms of the labor contract" will be preempted by § 301. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985). Furthermore, § 301 is unique in that it falls into the category of "complete preemption." *See* HENDERSON, *supra* note 5, at 848. As the Supreme Court explained in *Caterpillar Inc. v. Williams*:

> On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA.

482 U.S. 386, 393 (1987) (citations omitted) (internal quotation marks omitted). Once preempted under § 301, the claim is removable to federal court. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968) ("It is thus clear that the [§ 301] claim under this collective bargaining agreement is one arising under the

state law claims—breach of contract, promissory estoppel, negligence, and fraud—were absorbed into the hybrid claim, subject to the six-month statute of limitations, and dismissed.[122] In so deciding, the court stated that in *DelCostello* "the Supreme Court conclusively established that section 301 actions brought by individual employees are governed by the six-month statute of limitations borrowed" from the NLRA.[123]

Fox is a fascinating case because of its practical effect on the employee's lawsuit. Fox filed distinguishable federal and state lawsuits: a § 301 claim, a breach of duty of representation claim, and several other claims that had no basis other than state law. However, through the twin doctrines of § 301 preemption and the *DelCostello* hybrid exception,[124] the court dramatically reduced the limitations periods available to Fox: from fifteen,[125] six,[126] and four[127] years to just six months. Though it justified its decision as adherence to the Supreme Court's declaration of the need for uniformity in federal labor

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'laws of the United States' within the meaning of the removal statute." (citations omitted)).

The "complete preemption" doctrine of § 301 can be contrasted with other common forms of labor law preemption. For example, under *Garmon* preemption, when a claim alleges conduct that "is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). *See generally* GOLDMAN, *supra* note 43, at 62–69 (tracking the development of, and exceptions to, the *Garmon* doctrine).

Similar to the application of *DelCostello*, application of § 301 preemption in the circuit courts has been "difficult and inconsistent." *See* Grabar, *supra* note 15, at 2011. Generally, the courts have found employees' state law claims to be preempted by § 301 if either the resolution of the claim requires interpretation of the collective bargaining agreement, or if the state-law right asserted by the claim is waivable under the collective bargaining agreement. Stone, *supra* note 5, at 605–06. For additional discussion and critique on the doctrine of § 301 preemption, see *infra* notes 218–21 and accompanying text.

[122] *Fox*, 914 F.2d at 803.

[123] *Id.* This statement by the court is inaccurate, because the *DelCostello* Court did not forge a statute of limitations for all § 301 claims, but only for hybrid claims that combined breach of collective bargaining agreement with breach of the duty of fair representation. *See DelCostello*, 462 U.S. at 168–71.

[124] For further discussion on how expansive § 301 preemption compounds the problem of expansive *DelCostello* application, see *infra* notes 217–21 and accompanying text.

[125] OHIO REV. CODE ANN. § 2305.06 (West 2004) (fifteen-year statute of limitations for actions for breach of written contract).

[126] *Id.* § 2305.07 (six-year statute of limitations for actions for breach of unwritten contract).

[127] *Id.* § 2305.09 (four-year statute of limitations for actions for fraud).

law,[128] the practical reality of the decision was to foreclose Fox from filing her state claims by trimming her time for doing so to as much as *one-thirtieth*.

The Sixth Circuit has not limited § 301-hybrid preemption and dismissal to classic contract claims such as promissory estoppel and fraud. In *Adkins v. General Motors Corp.*, the court held that § 301 preemption extended to claims of emotional distress and subsequently dismissed the claims as time-barred under *DelCostello*.[129] In *Adkins*, the plaintiff-employees alleged that the conduct of their employer and union representative during collective bargaining—which they claimed amounted to collusion—intentionally inflicted severe emotional distress upon them.[130] The plaintiff-employees argued that the state's interest in protecting its citizens from emotional harm precluded their claim from complete preemption under § 301,[131] an argument which the district court accepted in part.[132] The court of appeals reversed, finding all of the emotional distress claims completely preempted under § 301.[133] The court found that the essence of the plaintiff-employees' emotional distress claim went "to the quality of their union representation and the fairness of their employer's labor practices, issues central to the concerns of federal labor law"; thus, "the state interest in adjudicating plaintiff's emotional distress claims [was] too insubstantial to defeat

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[128] *See Fox*, 914 F.2d at 799 (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987)). The *Caterpillar* Court concluded that "state law does not exist as an independent source of private rights to enforce collective bargaining contracts." *Caterpillar*, 482 U.S. at 394.

[129] 946 F.2d 1201, 1213 (6th Cir. 1991).

[130] *Id.* at 1204.

[131] The plaintiff-employees relied upon the Supreme Court's decision in *Farmer v. United Bhd. of Carpenters & Joiners of America*. *Id.* at 1212. In *Farmer*, a union official was "subjected to a campaign of personal abuse and harassment" during a dispute with other union officials. 430 U.S. 290, 292 (1977). While conceding that "a rigid application of the *Garmon* doctrine might support the conclusion . . . that [the plaintiff's] entire action was preempted by federal law," the Court nonetheless concluded that the claim of intentional infliction of emotional distress was not preempted. *Id.* at 302. The Court recognized that the state "has a substantial interest in protecting its citizens from the kind of abuse of which [the plaintiff] complained"; thus, it could not "conclude that Congress intended [through the NLRA] to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case." *Id.* at 302, 305.

[132] The district court held that as far as the emotional distress claims were based on the withholding of information contained in the collective bargaining agreement, they were preempted by § 301; however, as far as the emotional distress claims were based on concealing facts surrounding the formation of the agreement, the claims were not preempted. *Adkins*, 946 F.2d at 1212.

[133] *Id.* at 1213.

complete preemption."[134] Since this preempted state law claim was joined with a duty of representation claim, the court characterized it as a hybrid claim and dismissed it as time-barred under 10(b).[135]

Another Sixth Circuit case is significant for fashioning a non-LMRA federal claim into a § 301 hybrid claim on the basis that uniformity in the federal labor common law demanded an analogy to the NLRA statute of limitations. In *International Association of Machinists and Aerospace Workers v. Tennessee Valley Authority*, the Sixth Circuit considered the limitations period governing claims brought by a union against an employer and a larger labor organization.[136] The union, the International Association of Machinists and Aerospace Workers (IAM), had members employed by the Tennessee Valley Authority (TVA) and was a member organization of the Tennessee Valley Trades and Labor Council (Council).[137] In 1991, TVA entered into a contract (Project Agreement) with the Council that governed the use of labor unions by TVA contractors.[138] After several of the contractors employed workers from other unions for projects to which IAM workers had traditionally been assigned, IAM filed a series of grievances alleging breach of the Project Agreement.[139] Under the terms of the Project Agreement, these grievances were submitted to a committee consisting of representatives of TVA, its contractors, and the Council.[140] The Council denied each of IAM's grievances, and subsequently denied IAM's request for arbitration.[141]

Roughly one year later, IAM brought a lawsuit against both TVA and the Council in the U.S. District Court for the Middle District of Tennessee.[142] IAM alleged breach of contract, inducement of breach of contract, and breach of fiduciary duty, all causes of action it perceived as arising under Tennessee state contract law and subject to a three-year statute of limitations.[143] The district court disagreed and held the claims as arising

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[134] *Id.* In distinguishing *Farmer*, the court noted the Supreme Court "appear[ed] to establish the boundary between the central concerns of federal labor policy and the unpreempted interests of state law in protecting its citizens," a boundary that in the instant case had not been crossed in favor of the state. *Id.*

[135] *Id.* at 1203.

[136] 108 F.3d 658, 661 (6th Cir. 1997).

[137] *Id.* at 660.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 660–61.

[142] *Int'l Ass'n of Machinists*, 108 F.3d at 661.

[143] *Id.* IAM argued that because the TVA was not subject to the NLRA or the LMRA as a federal corporation, federal law should not apply to the breach of contract

under federal law, and thus time-barred under the *DelCostello* six-month statute of limitations.[144]

IAM argued in the court of appeals that its claim was not a *DelCostello* § 301-duty of representation claim because, as a federal corporation, TVA was specifically exempted from the NLRA and the LMRA.[145] However, the court reasoned that because "a TVA union's federal common law duty of fair representation is identical to that of a union whose members all work for private employers," the case was indistinguishable from *DelCostello*.[146] Like *DelCostello*, IAM's claim implicated "the need for stability and finality" in labor grievance and arbitration proceedings.[147] Thus, "given the pervasively federal nature of the rights and obligations of the TVA, its employees, and their unions," the court determined that IAM's claim fell "easily . . . within the range of labor cases . . . subject to the NLRA's six-month limitations period," and as such was time-barred.[148] This case, although involving a union as the plaintiff, may be one of the most expansive interpretations of the *DelCostello* exception, because even though the claim itself did not fall under the NLRA or the LMRA, a perceived unity of purpose with federal substantive law nonetheless compelled application of the § 10(b) statute of limitations. While this decision could be viewed at first blush as a procedural one, the court clearly engaged in a substantive policy determination in its adjudication of the case.

More recent Sixth Circuit hybrid cases illustrate the now-settled practice of implementing the six-month statute of limitations whenever breach of a collective bargaining agreement action and breach of union duty of representation action appear in the same lawsuit. They also illustrate which party usually comes out on the losing end of that statute of limitations. In *Hanely v. International Brotherhood of Locomotive Engineers*, the plaintiff Hanely brought claims against his employer, CSX, and his union after a seniority dispute arising under the collective bargaining agreement.[149] Hanely alleged that he had been displaced on CSX's employment roster, in violation of the collective bargaining agreement between CSX and the union, and accordingly filed a series of grievances with the company.[150] CSX denied his claims, and over the course of the next several years, Hanely

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action. *Id.* Moreover, IAM asserted that breach of fiduciary duty and inducement of breach claims arose solely under state law. *Id.*

144 *Id.*

145 *Id.* at 663.

146 *Id.*

147 *Id.* at 665.

148 *Int'l Ass'n of Machinists*, 108 F.3d. at 665.

149 69 F. App'x 292, 293 (6th Cir. 2003).

150 *Id.* at 296.

attempted to seek relief through his union representatives.[151] After the union failed to resolve his grievances, Hanely filed suit for breach of contract against CSX and breach of the union's duty of representation.[152]

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of the employer and union on the basis that Hanely's claim was time-barred under *DelCostello*.[153] With little discussion, the court characterized Hanely's claim as a hybrid cause of action arising under federal labor law, which was required to have been brought within six months from the date Hanely knew or should have known about the union's breach of its duty of fair representation.[154] The court determined that this limitations period ended over *four years* prior to when Hanely actually filed suit.[155] Hanely's lawsuit—which would have easily met the limitations period had state breach of contract law applied[156]—was thus dismissed from federal court.

In *Palmer v. Ford Motor Co.*, a thirty-year employee of Ford brought claims against his employer and union following a series of grievances he filed with both the employer and the union.[157] Similarly to *Hanely*, the court characterized Palmer's lawsuit as a hybrid claim with little discussion, and applied a six-month statute of limitations, which was fatal to his claim.[158] Once again, had Palmer only brought a § 301 claim against his employer, the claim would have been subject to the Ohio contract limitations period, which he would have easily satisfied. Mechanical application of the *DelCostello* limitations period once again applied, foreclosing his remedy in federal court.

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[151] *Id.* at 296–97.

[152] *Id.* at 297.

[153] *Id.* at 293.

[154] *Id.* at 298–99.

[155] *Hanely*, 69 F. App'x at 299.

[156] Ohio applies a fifteen-year statute of limitations for actions on breach of written contract. OHIO REV. CODE ANN. § 2305.06 (West 2004).

[157] No. 1:03CV430, 2004 U.S. Dist LEXIS 28073, at *5–6 (N.D. Ohio Apr. 22, 2004), *aff'd*, 134 F. App'x 887 (6th Cir. 2005).

[158] *Id.* at *16–17. The district court stated: "This is a claim under § 301 of the Labor Management Relations Act . . . otherwise known as a 'hybrid' action." *Id.* at *16. The statement is notable for its inaccuracy. Section 301 claims are not themselves hybrid claims. As explained above, hybrid claims were formed by the Supreme Court, not Congress, by combining § 301 claims with breach of union duty of representation claims. As illustrated by the Sixth Circuit in *Kraftco* and *Anderson*, straightforward § 301 claims are treated under a different analysis with respect to the statute of limitations. *See* Anderson v. AT&T Corp., 147 F.3d 467, 474 (6th Cir. 1998); Cent. States Se. & Sw. Areas Pension Fund v. Kraftco Inc., 799 F.2d 1098, 1107–08 (6th Cir. 1986).

The *Hanely* and *Palmer* cases in particular suggest a new trend in the Sixth Circuit's application of *DelCostello*. While previous cases had grappled extensively with the question of whether or not a *DelCostello* hybrid claim even existed, *Hanely* and *Palmer* assume they do, with little discussion. The language contained in *Palmer* in particular suggests that *every* § 301 claim is a *DelCostello* hybrid claim subject to the NLRA statute of limitations when, as discussed earlier, that is not the case.[159] Since the tight statute of limitations applicable to hybrid actions will often mean that the question is dispositive of the plaintiff-employee's case, the lack of careful analysis in these cases is disturbing.

The Sixth Circuit has not limited its expansive interpretation of *DelCostello* to cases that it perceived to consist of a hybrid § 301 cause of action. In *Holmes v. Donovan*, the court held that a LMRA § 302 claim was governed by the six-month period under § 10(b) of the NLRA.[160] A plaintiff-employee brought a § 302 claim[161] against his union, alleging that it had accepted a "thing of value" from an employer in violation of the LMRA.[162] The employee did not bring a claim against his employer: it was a straightforward § 302 claim against the union. Because no statute of limitations was provided in § 302, the district court borrowed the six-month period under the NLRA and dismissed the claim as time-barred.[163]

In affirming the decision of the district court, the Sixth Circuit found a "similarity of purpose" between § 302 and § 301 hybrid claims that compelled application of the six-month NLRA statute of limitations.[164] The court noted that § 302 claims and hybrid claims were both "designed to encourage and protect collective bargaining."[165] Furthermore, the court found that like hybrid claims, § 302 claims were similar to "unfair labor practices" prohibited under the NLRA.[166] Like many provisions of the

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[159] *See Palmer*, 2004 U.S. Dist. LEXIS 28073, at *16; *see also supra* note 158.

[160] 984 F.2d 732, 736–37 (6th Cir. 1993). As previously discussed, *Holmes* also limited the reach of *DelCostello* with respect to another plaintiff-employee's LMRDA claim. *See supra* notes 106–16 and accompanying text.

[161] Section 302 of the LMRA provides that "[i]t shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value" to a union or labor representative. 29 U.S.C. § 186 (2006). It is likewise illegal for the union or representative to accept such money or thing of value. *Id.*

[162] *Holmes*, 984 F.2d at 734.

[163] *Id.*

[164] *Id.* at 737. The court selected the six-month NLRA statute of limitations over several alternative time periods under Tennessee law which ranged from twelve months to ten years. *See id.* at 735; TENN. CODE ANN. §§ 28-3-110, 39-12-206, 40-2-102, 48-18-601, 48-58-601 (2008).

[165] *Holmes*, 984 F.2d at 736.

[166] *Id.*

NLRA, § 302 "was enacted as part of a comprehensive revision of federal labor policy . . . aimed at practices which Congress considered inimical to the integrity of the collective bargaining process."[167] Thus, even though "when Congress does not specify a statute of limitations to govern a federal action, the standard practice is to borrow an analogous statute from state law,"[168] the court found the unity in purpose between § 302 and § 301 hybrid claims to be sufficient to brush this practice aside, apply a six-month statute of limitations, and dismiss the claim.[169]

B. *Inconsistency in* DelCostello *Application Across the Circuits*

As the overview of the Sixth Circuit has indicated, federal courts may apply the *DelCostello* rationale in varying limiting and expanding contexts. While some courts may only apply the NLRA statute of limitation in the narrow circumstances illustrated in *DelCostello*, other courts may apply it to a variety of claims, including state claims found to be preempted by federal labor law and federal claims found to have a common purpose with hybrid claims under federal labor principles. The Sixth Circuit does not stand alone in this inconsistency; a brief overview of the use of *DelCostello* in other circuits illustrates that predicting the applicable statute of limitations in labor litigation is not always a sure thing.

The Fifth Circuit applied the NLRA six-month statute of limitations to an employee's § 301 claim brought solely against his union and dismissed the claim as untimely.[170] In *Smith v. International Organization of Masters, Mates, and Pilots*, the plaintiff-employee was a third-officer on a vessel owned by his employer, who was a party to a collective bargaining agreement with the employee's union.[171] After the employee's discharge—based on a vessel collision for which he was allegedly at fault—he asked the union to begin a grievance procedure set forth in the collective bargaining agreement, and filed a lawsuit against his employer.[172] The union subsequently informed the employee that it would not pursue the grievance, and the employer was awarded summary judgment with respect to the lawsuit.[173] The employee subsequently filed a claim under § 301 against his union, alleging damages arising out of its refusal to pursue his grievance.[174]

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[167] *Id.* (quoting Arroyo v. United States, 359 U.S. 419, 425 (1959)).

[168] *Id.* at 735.

[169] *See id.* at 736–37.

[170] Smith v. Int'l Org. of Masters, 296 F.3d 380, 383 (5th Cir. 2002).

[171] *Id.* at 381.

[172] *Id.*

[173] *Id.*

[174] *Id.*

The Fifth Circuit agreed with the district court's finding that the § 301 claim against the union should be read as a claim of breach of duty of fair representation.[175] Thus, the court considered what limitations period it should apply to the duty of fair representation claim "standing alone."[176] Although noting that in *DelCostello* the Supreme Court explicitly limited its analysis to § 301 hybrid claims, the circuit court nonetheless held that "[f]ollowing the logic of *DelCostello*, such a [duty of fair representation] claim is also subject to the six-month limitations period."[177] Like a hybrid claim, the employee's duty of representation claim was most analogous to an unfair labor practice charge under the NLRA.[178] While noting that "the Court did not necessarily define all breaches of a union's duty of fair representation as unfair labor practices," the "'substantial overlap'" between the two causes of action compelled application of the six-month statute of limitations.[179]

Guided by *DelCostello*, the Eleventh Circuit formulated a "fluid balancing test" to determine what statute of limitations to apply to straightforward § 301 claims.[180] For example, in *International Association of Machinists and Aerospace Workers v. Allied Products*, the plaintiff-union brought a § 301 claim against an employer to compel arbitration.[181] The court noted that the case involved a straightforward § 301 action, as opposed to a hybrid claim, and acknowledged that *Hoosier Cardinal*[182] "would seem to require" application of a state six-year statute of limitations for contract actions.[183] However, the court found that *DelCostello* brought "into question the automatic application of state statutes of limitations in straightforward § 301 actions" and opened the door for federal courts to apply federal time periods when they provided a closer analogy than state statutes.[184] Accordingly, the court adopted a rule which "require[d] the court to adopt state limitations periods if they provide a direct analogy and arise out of

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[175] *Id.* at 382.

[176] *Smith*, 296 F.3d at 382.

[177] *Id.* at 382–83.

[178] *Id.* at 383.

[179] *Id.* (quoting DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 170 (1983)).

[180] *See, e.g.*, Int'l Ass'n of Machinists v. Allied Products Corp., 786 F.2d 1561, 1563 (11th Cir. 1986); Samples v. Ryder Truck Lines, Inc., 755 F.2d 881, 888 (11th Cir. 1985).

[181] *Allied Products*, 786 F.2d at 1562.

[182] UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 708 (1966) (applying state contracts limitation period to a straightforward § 301 claim).

[183] *Allied Products*, 786 F.2d at 1563.

[184] *Id.*

similar policy considerations, but to adopt the § 10(b) period if state law does not afford sufficiently direct guidance."[185]

Applying this test to the claim before it, the court found § 10(b) more analogous than available state contract periods.[186] As an action to compel the employer to participate in arbitration, the claim "involve[d] more federal concerns than the simple breach of contract claim in *Hoosier Cardinal*," notably, the "federal policy of the prompt resolution of labor disputes."[187] With the six-month NLRA limitation period in effect, the circuit court affirmed the district court's dismissal of the union's § 301 claim.[188]

The Ninth Circuit declined to apply the six-month NLRA statute of limitations to a pilot's "first right of hire" claim against two airlines.[189] In *Gonzalez v. Aloha Airlines*, the pilot brought a lawsuit under the Employee Protection Program (EPP) of the Airline Deregulation Act[190] against the airlines, alleging he had been unlawfully denied preferential hiring status.[191] The applicable statute contained no limitation period, but the district court, relying on *DelCostello*, applied the NLRA six-month period, and barred the claims as untimely.[192]

The circuit court reversed, holding that a two-year state limitations period for suits brought in state court seeking recovery authorized by federal statute applied to the pilot's EPP claims.[193] While the court recognized that the "EPP claim may affect seniority relationships between employees, as well as the relationship between the successful EPP litigant and the employer," it found that because no union relationship was involved, the EPP claim should be governed by state law.[194] The court noted that the federal policy furthered by the EPP was to assist employees who lost their jobs as a result of airline deregulation, regardless of whether the airline was a signatory to a collective bargaining agreement.[195] Unlike the hybrid claim in *DelCostello*, the pilot's EPP claim did not invoke the federal policy

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[185] *Id.* (citing *Samples*, 755 F.2d at 888).

[186] *Id.* at 1564.

[187] *Id.*

[188] *Id.* at 1564–65.

[189] Gonzalez v. Aloha Airlines, Inc., 940 F.2d 1312, 1315 (9th Cir. 1991).

[190] Law of July 5, 1994, 49 U.S.C. app. §1552(d) (repealed 1998).

[191] *Gonzalez*, 940 F.2d at 1314.

[192] *Id.*

[193] *Id.* at 1316.

[194] *Id.* at 1315. This implication of employee–employer relationships was the district court's basis for invoking *DelCostello*. *Id.*

[195] *Id.*

surrounding collective bargaining—thus the application of a state statute of limitations would not undermine such a policy.[196]

The Seventh Circuit found that a LMRA § 303[197] claim brought by a construction company against a union was subject to a five-year state statute of limitations for tort actions, and not the six-month period under the NLRA.[198] In *BE&K v. Will & Grundy*, the plaintiff-construction company entered into a contract with a third party contractor to provide various repair services at oil refineries.[199] In response, and because the plaintiff was a non-unionized company, the defendant-union that represented workers at these refineries threatened both the contractor and the oil refineries with picketing.[200] After being removed from the job due to the threat, the plaintiff sued the union under § 303, alleging an illegal threat of "secondary pickets."[201]

The union argued that while § 303 does not expressly provide a statute of limitations, it does provide that all claims arising under it are "subject to the limitations and provisions of section 301 of this title."[202] The union reasoned that *DelCostello* mandated use of the NLRA six-month statute of limitations for § 301 claims, and thus this limitations period applied for the § 303 claim as well, barring the plaintiff's lawsuit.[203] The circuit court, while noting that at first blush the argument "seem[ed] logical enough," declined to apply the NLRA statute of limitations.[204] Because the "policy interests justifying a six-month limitations period for a hybrid section 301-fair representation claim do not exist when the suit involves a section 303 unfair labor practices claim," the six-month period applied in *DelCostello* was not justified.[205] Unlike the parties in *DelCostello*, the company and union were "completely unrelated" except for the fact that both were affected by the secondary boycott; thus,

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[196] *Gonzalez*, 940 F.2d at 1315. The court did not address whether *DelCostello* would apply if either of the airlines involved were signatories to a collective bargaining agreement.

[197] 29 U.S.C. § 158(b)(4) (2006) (providing that "[i]t shall be an unfair labor practice for a labor organization" to threaten action constraining business between two persons, unless that action consists of a "primary strike or picketing activity").

[198] BE&K Constr. Co. v. Will & Grundy Ctys. Bldg. Trades Council, 156 F.3d 756, 763 (7th Cir. 1998).

[199] *Id.* at 759.

[200] *Id.* at 760.

[201] *Id.* at 760–61.

[202] *Id.* at 762 (quoting 29 U.S.C. § 187 (1994)).

[203] *Id.*

[204] *BE&K*, 156 F.3d at 762.

[205] *Id.* at 763.

labor peace did not depend on the rapid resolution of the § 303 suit.[206] Since the policy interests were divergent from *DelCostello*, the court applied the most closely analogous state limitations period: five-years for tort actions.[207]

IV. *DELCOSTELLO* IN CONTEXT: MOVING AWAY FROM THE FEDERAL COMMON LAW APPROACH

As shown above, the application of *DelCostello* in federal labor litigation has led to inconsistent limitations periods on claims brought by employees (and occasionally unions) against their employers and union representatives. Moreover, the doctrine established by *DelCostello* has become a potent weapon for employer- and union-defendants seeking to bar claims asserted against them. Particularly when combined with an expansive view of § 301 preemption, the hybrid exception can be used to exclude a variety of state law claims that invoke collective bargaining principles. *DelCostello*'s impact does not end with this practical impact on individual claims: rather, the hybrid exception implicates broader concerns with respect to both labor law and the proper role of the federal Judiciary in lawmaking.

A. *Putting the Collective Before the Individual*

First, the use of the *DelCostello* doctrine to bar claims is illustrative of a broader trend of diminishing protection of unionized employees.[208] By invoking the need for national uniformity in the resolution of collective bargaining disputes, the Court put the interests of the labor system over the interests of individual unionized employees. While focus on the collective over the individual has long been considered a fundamental basis of labor law, expansive application of *DelCostello* goes too far and unfairly subordinates the individual interests of employees by effectively barring them from state law remedies. As a result, employees subject to a collective bargaining agreement have less protection under existing law than their non-unionized counterparts.

The tension between individual employee rights and collective interests has been present in federal labor law since the earliest Supreme Court

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[206] *Id.* (quoting Monarch Long Beach Corp. v. Soft Drink Workers, Local 812, Int'l Bhd. of Teamsters, 762 F.2d 228, 231 (2d Cir. 1985)).

[207] *Id.* at 763. Since the union did not challenge which state statute should be applied on appeal, the Seventh Circuit applied the limitations period that the district court found most analogous to § 303. *Id.*

[208] *See* Stone, *supra* note 5, at 576–78. Stone argues that while protection of unionized employees has decreased in recent years, protection for non-unionized employees has increased, leading to a "tension between the new individual employment rights and the New Deal system of collective bargaining." *Id.* at 577.

decisions interpreting the NLRA. In *J.I. Case v. NLRB*, the Court contemplated the role of individual employment contracts in the context of collective bargaining.[209] While the Court found that individual contracts were not forbidden by the NLRA, it held that such contracts could not be used to circumvent collective bargaining, nor to waive any benefit conferred by a collective bargaining agreement.[210] According to the Court's rationale:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.[211]

Even if the individual contract terms were more favorable than those found in the collective bargaining agreement, the Court found that they were not presumptively valid, since the "practice and philosophy of collective bargaining looks with suspicion on such individual advantages."[212] However, the Court did hold that the individual employee was entitled to individual rights under the terms of the collective bargaining agreement.[213]

The individual/collective tension persisted in *Republic Steel Corp. v. Maddox*, which held that a unionized employee must exhaust the grievance procedures provided under a collective bargaining agreement if they are exclusive by the terms of the agreement.[214] In so holding, the Court recognized the employer and union interest in establishing the "'common law' of the plant" through grievance and arbitration, and found that "permit[ting] an individual employee to completely sidestep available grievance procedures" would undercut the exclusivity of this arrangement.[215] In his dissent, Justice Black decried what he considered the subrogation of an

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[209] 321 U.S. 332, 333–34 (1944). The Court was tasked with determining whether an employer's refusal to bargain on the basis that it would subordinate employees' rights under individual contracts constituted an unfair labor practice. *Id.*

[210] *Id.* at 337–38.

[211] *Id.* at 338.

[212] *Id.* The Court did not decide the issue conclusively, leaving the question of "whether under some circumstances [individual contracts] may add to [collective agreements] in matters covered by the collective bargain . . . to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices." *Id.* at 339.

[213] *Id.* at 336 ("[A]n employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms.").

[214] 379 U.S. 650, 651–52 (1965).

[215] *Id.* at 653.

"ordinary, common, run-of-the-mill lawsuit for breach of contract" in favor of federal labor policy interests.[216] Under the majority's holding, "[e]mployees are thus denied a judicial hearing" in the name of "accommodating the wishes of employers and unions in all things over the desires of individual workers."[217]

As Professor Katherine Van Wezel Stone argues, the tension may be best illustrated by the doctrine of § 301 preemption.[218] Broad § 301 preemption extinguishes the plaintiff-employee's state law right, and forces the employee to engage in private arbitration under the terms of the collective bargaining agreement, thereby denying the employee "the benefit of a judicial forum" as well as "the benefit of the substantive provisions of the state employment right."[219] According to Stone, the Supreme Court's justification for the expansive preemptive effect of § 301 was to preserve the "sanctity of the mini-democracy" of collective bargaining.[220] Under an "industrial pluralist

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[216] *Id.* at 659 (Black, J., dissenting).

[217] *Id.* at 662–63.

[218] *See* Stone, *supra* note 5, at 577–78 ("[B]y means of a broad § 301 preemption doctrine, courts have erected a rigid barrier between collectively bargained rights and individual employment rights. As a result, unionized workers now have, in many respects, fewer employment rights than do their nonunion brothers and sisters."). For an example and discussion of broad § 301 preemption as it applies to a hybrid claim, see *supra* notes 117–35 and accompanying text.

[219] Stone, *supra* note 5, at 594–96 *see also* Grabar, *supra* note 15, at 1997–98 (recognizing that § 301 actions are "advantageous for many employer defendants because they place mandatory satisfaction of certain procedural burdens on aggrieved plaintiffs," and are often "quashed during the first round of dispositive motions"); Yates, *supra* note 15, at 484 (recognizing the "distinct advantage" an employer has in § 301 claims due to procedural safeguards).

[220] Stone, *supra* note 5, at 624. In *Allis-Chalmers Corp. v. Lueck*, the Court justified § 301 preemption of state contract and tort actions upon "[t]he interests in interpretive uniformity and predictability" of collective bargaining agreements. 471 U.S. 202, 211 (1985). Subsequent § 301 decisions by the Court struggled to draw the line upon which this collective bargaining interest overrides the state law rights of individual workers. For example, in *International Brotherhood of Electrical Workers v. Hechler*, the Court expanded § 301 preemption to tort claims brought solely against the union bargaining representative, on the theory that a court would have to interpret the collective bargaining agreement in order to determine whether the union owed the plaintiff a duty of care under state law. 481 U.S. 851, 862 (1987). In *United Steelworkers of America v. Rawson*, the Court found that § 301 completely preempted a state law wrongful death action brought by the survivors of minors who had died in a workplace accident. 495 U.S. 362, 371–72 (1990). The Court reasoned that the tort claim could not "be described as independent of the collective bargaining agreement," because any duty breached by the union "was a duty arising out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners." *Id.* at 371.

The Court began to push back against broad preemption of individual state law claims in *Caterpillar Inc. v. Williams*, which held that a state law claim alleging breach of

view" of labor relations, federal courts tend to believe that "the terms of the bargain that the parties to the mini-democracy reach, and the enforcement mechanism that the parties establish, are superior to any state-imposed employment terms."[221] Thus, even if an individual employee can obtain a higher degree of protection on his own under state law, as is often the case, the industrial pluralist view dictates that he must yield to the result achieved through collective action.[222]

If indeed "sound labor policy dictates protection of employees, whether or not they are represented by unions and participate in the collective bargaining process,"[223] why should we deny unionized employees access to state common law protection? In light of the labor movement's increasing inability to represent the interests of its constituent employees,[224] the answer is we should not. The collective bargaining process itself can subordinate the

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individual employment contracts was not removable to federal court by virtue of § 301 preemption. 482 U.S. 386, 398–99 (1987). The Court first explained the uniquely powerful preemptive effect of § 301 as a corollary to the well-pleaded complaint rule. *Id.* at 393; *see also supra* note 121. The Court then recognized that if the plaintiff-employees had brought claims arising out of the applicable collective bargaining agreement, § 301 preemption takes effect. *Caterpillar*, 482 U.S. at 394–95. However, as masters of the complaint, the plaintiff-employees instead chose to bring claims arising out of *individual* contracts; thus the defendants were precluded from "injecting a federal question into an action that asserts what is plainly a state-law claim, transform[ing] the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 398–99. In *Lingle v. Norge Div. of Magic Chef Inc.*, the Court similarly held that "even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." 486 U.S. 399, 409–10 (1988). For a brief discussion of the Court's recognition in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), of the state's interest in protecting its citizens vis-à-vis tort claims superseding federal labor policy, see *supra* note 131.

[221] Stone, *supra* note 5, at 625. Stone describes "industrial pluralism" as a "descriptive and prescriptive vision of the workplace as a microcosmic constitutional democracy, a mini-democracy in the private sphere." *Id.* at 623. This "mini-democracy" consists of a judicial branch: private arbitration to decide disputes arising under the collective bargaining agreement. *Id. See generally* GOULD, *supra* note 5, at 77 (arguing that collective bargaining is a more effective way to protect worker rights, despite the development of state wrongful discharge law).

[222] As William Gould recognizes, state law wrongful discharge litigation, in the non-union context, has been the "most sweeping and radical change in American labor law." Gould, *supra* note 5, at 65.

[223] *Id.* at 8.

[224] *See id.* at 2 (noting that the "decline of the labor movement itself . . . has made workers more vulnerable than at any time since the Great Depression of the 1930s").

interests of employees.[225] Moreover, many employees are not even willing constituents of their union representative; thus, to further deny these employees relief carved out by state law—independent of the federal scheme—is an unconscionable denial of individual rights.

Yet the *DelCostello* hybrid exception builds on this theme of denying unionized employees rights in the name of a national collective bargaining policy. Under the exception, not only must the unionized employee exhaust all remedies under the collective bargaining agreement, but the employee must file suit within six months of accrual of the claim, greatly enhancing the "distinct advantage" the defendant-employer already possesses.[226] The *DelCostello* Court's justification for borrowing the six-month statute of limitations over longer state limitations periods was in part to promote "the national interests in stable bargaining relationships and finality of private settlements."[227] Similar to what Stone perceives as the industrial pluralist justification for § 301 preemption, the *DelCostello* rationale puts the autonomy of private dispute resolution under collective bargaining ahead of individual employee rights. While a non-unionized employee is free to bring a breach of contract claim against his or her employer within a period of

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[225] Under a "revisionist" view of labor law, collective bargaining is rejected as an undesirable institution, in favor of employment-at-will. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 118–19 (1990). Such a view considers at-will employment, with accompanying state common law remedies, to be a more sound approach economically as well as a more just approach individually. *See, e.g.*, DAN C. HELDMAN ET AL., DEREGULATING LABOR RELATIONS 10–11 (1981) (arguing for deregulation of the labor market as economically beneficial to consumers and employees alike). Heldman claims that a deregulatory approach "focuses on the employee—the central participant in the labor relations arena whose interests are all too often submerged in the machinations of large unions, big government, and corporations." *Id.* at Foreward. *See also, e.g.*, Richard A. Epstein, *A Common Law Approach for Labor Relations: A Critique on the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357–58 (1983). In Epstein's famous labor law critique, he argues:

> New Deal [labor] legislation is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law. The tort principles protect all individuals against the use or threat of force, and—of great relevance here—against deliberate inducement of breach of contract. The contract principles allow individuals within this social framework of entitlements to make whatever bargains they please with whomever they please.

Id. The limited scope of this Note prevents an analysis of such freedom-of-contract view of labor law; however, it is worth noting that broad *DelCostello* application undermines the common law contract and tort basis for this approach.

[226] *See* Yates, *supra* note 15, at 484.

[227] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 171 (1983) (quoting UPS, Inc., v. Mitchell, 451 U.S. 56, 70–71 (1981) (Stewart, J., dissenting)).

several years, a unionized employee whose breach of contract claim falls under a § 301 hybrid claim must bring suit within six months of accrual, greatly enhancing the possibility of dismissal.

B. *Judicial Legislation*

The "national uniformity" in collective bargaining justification in *DelCostello* mirrors the justification set forth by the Court in crafting the doctrine of § 301 preemption, and implicates the second problem of hybrid claim application: the proper role of the federal court in substantive lawmaking. In *Textile Workers Union v. Lincoln Mills*, the Court struggled internally with its own proper role in adjudicating federal labor litigation.[228] Specifically, it grappled with the precise power Congress granted federal courts by enacting § 301.[229] While the legislative history of the LMRA could be described as ambiguous at best,[230] the majority nonetheless found sufficient justification to find in § 301 not a mere grant of jurisdictional authority, but a prerogative to fashion substantive law through a "range of

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[228] In *Lincoln Mills*, 353 U.S. 448 (1957), the Court held that § 301 did not merely grant the federal courts jurisdiction over breach of collective bargaining agreement claims, but "expresse[d] a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Id.* at 455. Thus, the Court found that federal substantive law, "which the courts must fashion from the policy of our national labor laws," would apply in § 301 claims. *Id.* at 456. This view of § 301 was not unanimous: in dissent, Justice Frankfurter construed § 301 as "an exclusively procedural provision, affording . . . an accessible federal forum for suits on agreements between labor organizations and employers, but not enacting federal law for such suits." *Id.* at 462 (Frankfurter, J., dissenting); *see also* Redish, *supra* note 4, at 789 n.113.

[229] *See Lincoln Mills*, 353 U.S. at 450–51 (discussing the two competing interpretations of § 301).

[230] Both the majority and dissent closely examined the legislative history of the LMRA, producing a variety of evidence to support their positions. For example, the majority found a Senate Report stating that "[s]tatutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step" as persuasive in justifying the formation of the federal labor common law. *Id.* at 454 (quoting S. REP. NO. 80-105, at 17 (1947)). In contrast, Justice Frankfurter considered the legislative history as conferring under § 301 nothing more than the "conventional remedies" available under state law. *Id.* at 469 (Frankfurter, J., dissenting). Much of the legislative history can lend itself to *both* interpretations. For example, the Conference Report on § 301 provides that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the [NLRB]." H.R. REP. NO. 80-510, at 42 (1947) (Conf. Rep.). It would seem that a reasonable interpretation of "usual processes of the law" would be state contract law; however, the *Lincoln Mills* majority considered this phrase as supportive of their view. *See Lincoln Mills*, 353 U.S. at 452–53.

judicial inventiveness."[231] In this sense the Court "unquestionably played an activist role" in substantive labor law development.[232] By seeking to legislate from the bench by "shap[ing] policy in the manner in which it anticipate[d] that Congress would have decided," the Court circumvented the proper role of the political branches and unilaterally brought the promulgation of substantive labor lawmaking within the judicial realm.[233]

Similarly, by invoking the perceived policy interests of § 301 to craft a statute of limitations for hybrid claims, the Court usurped the authority of the national and state legislatures in determining the applicable time periods for filing lawsuits against employers and unions. The federal courts, when applying a broad interpretation of *DelCostello*—and in particular when combined with a broad interpretation of § 301 preemption—further usurp the role of state legislatures in determining the statute of limitations for state law claims.

This form of federal common law-making violates the non-delegation principle as it applies to the federal courts,[234] and undermines the legitimacy of the democratic process by placing policy determinations in the hands of non-majoritarian judicial bodies.[235] Certainly, the federal courts must at times "gap-fill" statutes in order to give them practical application, and providing a statute of limitations to a statutory claim when none is expressly provided for is a clear example of this necessity.[236] However, when engaging in such gap-filling, the courts must be careful not to inject their own policy determinations in place of those of the legislature;[237] if they do, then the gap-

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[231] *Id.* at 456–57.

[232] *See* GOLDMAN, *supra* note 43, at 123.

[233] *See id.* at 124. Goldman weighs the competing arguments behind this form of judicial activism. On one hand, it threatens democratic institutions by enacting substantive law which, by virtue of the lengthy legislative process, may prevail despite majority opposition. *Id.* However, the "very cumbersomeness of the legislative process" may justify judicial activism as "an absolutely essential ingredient in the survival of the American governmental system." *Id.*

[234] *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 422 (2008) (arguing that since legislative "delegations to courts . . . raise precisely the same concerns as delegations to agencies," the non-delegation doctrine should apply to courts).

[235] *See* Redish, *supra* note 4, at 801 ("In a representational democracy it is neither morally nor politically legitimate for the federal judiciary . . . to reverse or ignore congressional choice.").

[236] Professor Redish includes statute of limitations gap-filling in his list of judicial practices which may be properly considered statutory interpretation, and not creative judicial lawmaking. *See id.* at 794–96.

[237] *See id.* at 795 (stating that judicial gap-filling "must be carefully confined . . . lest it effectively legitimize the very common law creation clearly prohibited by the Rules of Decision Act").

filling process is not merely procedural in nature, but rather a substantive determination regarding the nature of the rights implicated by a cause of action. By breaking from the tradition[238] of borrowing statutes of limitations from analogous state law, the *DelCostello* Court likewise supplanted the judgment of the state legislatures—with respect to the causes of action that they have created—with its own musings on balancing national collective bargaining interests. Furthermore, the federal courts, through inconsistent and broad application of *DelCostello*, have continued to replace the policy considerations of state legislatures with federal labor common law, resulting in limitations periods of much shorter length than state law provides. When combined with broad § 301 preemption, this can result in cases where an employee's state law claims against an employer are absorbed by federal law and summarily dismissed under the *DelCostello* statute of limitations.[239]

The more sound and equitable approach with respect to breach of collective bargaining-breach of the duty of fair representation litigation would be to move away from federal common law determinations, and allow the claims to be subject to limitations periods expressly authorized by a legislative body. The most straightforward (albeit probably most unlikely) source of legislative authorization would be a congressionally-established limitations period for all § 301 claims, hybrid or not. This could be accomplished through a direct amendment to the LMRA, or through a stronger residual limitations period with retroactive effect.[240] Direct congressional authorization would eliminate the need for any judicial gap-filling, increase the political legitimacy of § 301 claims,[241] and provide a consistent limitations period for § 301 claims across the circuits, regardless of whether or not they are joined with a breach of the duty of fair representation claim against the employee's union.

Until Congress adopts such a solution, or until the Supreme Court abandons the hybrid approach, the federal courts should adhere to the tradition of borrowing state statutes of limitations. This can be done without violating the precedent of *DelCostello* by interpreting the hybrid exception narrowly, and by carefully parsing the facts of individual cases to ensure strict application of the NLRA statute of limitations only when specifically required by the *DelCostello* doctrine. Additionally, courts should apply a

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238 *See supra* notes 19–20 and accompanying text.

239 *See* discussion of *Fox v. Parker Hannifin Corp.* and *Adkins v. Gen. Motors Corp.*, *supra* notes 117–35 and accompanying text.

240 As noted earlier, the current federal residual statute of limitations provision, 28 U.S.C. § 1658, does not apply to any statutory cause of action in place before December 1, 1990. *See* Mikva and Pfander, *supra* note 17, at 395.

241 *See* Redish, *supra* note 4, at 764 ("[i]t is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches.").

narrow preemptive effect to § 301 claims, ensuring that state law claims are enveloped in the federal law only if they directly implicate a breach of a collective bargaining agreement.[242]

The Sixth Circuit cases, *Kraftco*[243] and *Anderson*,[244] are illustrative of such an approach. The *Kraftco* court was careful to note that *DelCostello* did not "green light" the use of the NLRA statute of limitations to all labor claims that could conceivably come under its influence.[245] Therefore, since the claim only involved a breach of a collective bargaining agreement, the court found it appropriate to apply a state contract statute of limitations.[246] Similarly, the *Anderson* court recognized that the *DelCostello* Court "took great pains to make clear that there is no generally applicable limitations period for Section 301 claims; instead, the appropriate limitations period depends on the particular claims raised in the case."[247] Unlike other Sixth Circuit cases which interpreted *DelCostello* as providing a universal statute of limitations for any claim brought under § 301 (whether directly or through preemption),[248] the *Kraftco* and *Anderson* courts engaged in a nuanced discussion of the exact nature of cases involved, and attempted to apply the statute of limitations most directly authorized by a legislative body for the claim. This narrow and careful application of *DelCostello* respects the proper role of the legislature in crafting substantive provisions of the law, and does not put uniform collective bargaining interests over individual employee rights. Additionally, the practical effect of such an application will be to provide plaintiff-employees with more generous limitations periods, and eliminate a tool used by employer-defendants to dispose of claims against them before they reach the merits.

V. CONCLUSION

This Note has shown that by crafting a new cause of action, and an accompanying limitations period, under the guise of promoting national interests in collective bargaining, the Supreme Court in reality created a

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[242] The federal courts have struggled in determining the breadth of § 301 preemption of state law claims. *See supra* note 219.

[243] Cent. States Se. & Sw. Area Pension Fund v. Kraftco Inc., 799 F.2d 1098, 1107–08 (6th Cir. 1986); *see supra* notes 86–97 and accompanying text.

[244] Anderson v. AT&T Corp., 147 F.3d 467, 469 (6th Cir. 1998); *see supra* notes 98–105 and accompanying text.

[245] *See Kraftco*, 799 F.2d at 1107.

[246] *Id.* at 1108.

[247] *Anderson*, 147 F.3d at 474.

[248] *See, e.g.*, Palmer v. Ford Motor Co., No. 1:03CV430, 2004 U.S. Dist. LEXIS 28073, at *16 (N.D. Ohio Apr. 22, 2004), *aff'd*, 134 Fed. App'x 887 (6th Cir. 2005); Fox v. Parker Hannifin Corp., 914 F.2d 795, 803 (6th Cir. 1990).

significant roadblock for plaintiff-employees seeking remedy against their employers and unions. Not only must these employees exhaust remedies contained in the collective bargaining agreement before seeking judicial relief, but they must file suit within six months, a much tighter time frame than is available to non-unionized employees claiming breach of contract against an employer under state law. By departing from its traditional practice of borrowing analogous state time periods, the Court usurped the legislatures' lawmaking prerogative, and unjustly put the sanctity of the collective bargaining institution ahead of individual employee rights.

The federal courts should respond to this error by limiting the scope of the *DelCostello* exception and carefully considering the actual nature of the claims at bar. If the claim invokes a right created by virtue of state law, then the courts should apply the limitations period that the state legislature intended, and not the period that the courts created through federal labor common law. Not only would this approach better embrace the proper role of the federal Judiciary, but it would also provide plaintiff-employees—who already face an uphill battle in § 301 claims[249]—a more equitable time period to file claims against their unions and employers.

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[249] *See supra* notes 41–45 and accompanying text.